

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MARIO WELCH,

Defendant and Appellant.

B285596

(Los Angeles County
Super. Ct. No. TA140851)

APPEAL from a judgment of the Superior Court of Los Angeles County. Allen J. Webster, Judge. Affirmed.

Heather L. Beugen for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Chung L. Mar, for Plaintiff and Respondent.

* * * * *

A jury convicted Mario Welch (defendant) of operating a chop shop and receiving stolen property. During sentencing, neither the trial court nor defense counsel recognized that defendant was eligible for a “split sentence” (that is, a sentence that is part jail and part community release). Although defendant has forfeited this claim of error by not requesting a split sentence during his sentencing hearing, and although the record reveals no possible tactical reason for not doing so, we ultimately conclude that it is not reasonably probable that the trial court would have imposed a split sentence. Accordingly, we affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

In late July 2016, law enforcement officers investigating a shooting at a house found defendant with a car part in his lap and two shaved car keys in his pocket. In the rear portion of the house’s driveway was a 1994 GMC Yukon with an open hood and missing grill, a Chevy Suburban’s engine, a hoist capable of lifting engines, and a variety of tools for disassembling and assembling car parts. Both the Yukon and the Suburban (from which the engine had been removed) had been stolen from their owners in the preceding seven weeks. The bedroom where defendant was initially found contained two loaded firearms, the first tucked behind the bedframe and the second in an open shoe box under the bed.

II. Procedural Background

The People charged defendant with (1) operating a chop shop (Veh. Code, § 10801), (2) two counts of receiving stolen property for the Yukon and the \$3,800 engine from the Suburban (Pen. Code, §§ 496d, subd. (a) [receiving stolen automobile], 496,

subd. (a) [receiving stolen property worth more than \$950]), and (3) two counts of being a felon in possession of a firearm (§ 29800, subd. (a)(1)). The People further alleged that defendant had served eight prior prison terms (§ 667.5, subd. (b)).

The matter proceeded to a jury trial. The jury convicted defendant of operating a chop shop and both counts of receiving stolen property, but acquitted him of being a felon in possession.

The trial court sentenced defendant to five years in county jail, comprised of a mid-term, three-year sentence for operating a chop shop followed by two one-year enhancements for serving a prior prison term. The court stayed the receiving stolen property counts under section 654, and dismissed the remaining prior prison term enhancements as invalid. Defense counsel submitted a sentencing memorandum and appeared at the sentencing hearing, but at no point reminded the trial court of its presumptive duty to impose a split sentence under section 1170, subdivision (h)(5)(A). During the sentencing hearing, the trial court initially mentioned on two occasions that it was sentencing defendant to “state prison” but ultimately acknowledged that defendant was by statute to be sentenced to county jail. At no point did the trial court consider whether to impose a split sentence.

Defendant filed this timely appeal.

DISCUSSION

Defendant argues that the trial court erred in not acknowledging its discretion to impose a split sentence, in not applying the statutory presumption in favor of such a sentence, and in not explaining on the record why that presumption was rebutted in this case.

Defendant is correct that the Realignment Act of 2011 confers upon trial courts the discretion to suspend some “concluding portion” of certain sentences and to order that the defendant serve that suspended portion under “mandatory supervision” while released into the community. (§ 1170, subds. (h)(5)(A), (B); *People v. Catalan* (2014) 228 Cal.App.4th 173, 178.) Each of the crimes of which defendant is convicted qualifies for such a split sentence. (Veh. Code, § 10801 [requiring sentencing pursuant to section 1170, subdivision (h)]; § 496d, subd. (a) [same]; § 496, subd. (a) [same].) Defendant is correct that a split sentence is the *presumptive* sentence “[u]nless the court finds, in the interests of justice,” that such a sentence “is not appropriate in a particular case,” and that a court is required to “state the reasons for [any] denial” of a split sentence “on the record.” (§ 1170, subd. (h)(5)(A); Cal. Rules of Court, rule 4.415(a), (d); *People v. Arce* (2017) 11 Cal.App.5th 613, 618.) And defendant is correct that the trial court in this case did not impose a split sentence, acknowledge its presumptive duty to do so, or explain why it was not doing so.

Had defense counsel objected or otherwise raised the issue of a split sentence during the sentencing hearing, defendant would undoubtedly be entitled to a new sentencing hearing at which the trial court would be tasked with deciding whether, in its discretion, to impose a split sentence. (*People v. Downey* (2000) 82 Cal.App.4th 899, 912; *People v. Fields* (1984) 159 Cal.App.3d 555, 571; see generally *People v. Belmontes* (1983) 34 Cal.3d 335, 348, fn. 8.) But there was no objection or raising of the issue, and these failures are an absolute bar to relief where, as here, defense counsel had a “meaningful opportunity to object”

or raise the issue. (*People v. Gonzalez* (2003) 31 Cal.4th 745, 751; *People v. Scott* (2015) 61 Cal.4th 363, 406.)

Recognizing this deficiency, defendant argues that his counsel was constitutionally ineffective for not objecting or otherwise advising the court of the presumption favoring a split sentence. An attorney provides constitutionally ineffective assistance if (1) his representation is deficient, and (2) there is a “reasonable probability that, but for counsel’s deficient [representation], the outcome of the proceeding would have been different.” (*People v. Mai* (2013) 57 Cal.4th 986, 1009; *Strickland v. Washington* (1984) 466 U.S. 688, 692.) We independently review such a claim. (*People v. Rich* (1988) 45 Cal.3d 1036, 1096.)

An attorney’s representation is not deficient when it is based on a “reasonable tactical decision[.]” (*Mai, supra*, 57 Cal.4th at p. 1009.) Because the record on direct appeal is more confined, courts will find deficient representation on direct appeal due to counsel’s failure to object only if (1) “the record affirmatively discloses counsel had no rational tactical purpose for” his failure to object, or (2) “there simply could be no satisfactory [tactical] explanation.” (*Ibid.*) Here, the record does not disclose any tactical reason why defense counsel would not have asked the trial court to apply the presumption in favor of a split sentence and we perceive no “satisfactory explanation” for his failure to do so. In our view, there is no rational reason not to request a reduction in custody time, especially when such a reduction is the statutorily favored option. (Accord, *People v. Cotton* (1991) 230 Cal.App.3d 1072, 1085 [“Counsel’s duty at sentencing is to be familiar with the sentencing alternatives available to the court, [and] to make sure that the court is aware

of such alternatives . . .”].) The People suggest that defense counsel might have seen a practical advantage in waiting for another pending criminal case pending against defendant to be resolved and in then seeking a recall of the sentence in this case under section 1170, subdivision (d) once the other case was resolved; doing so, the People contend, would avoid a messier calculation of custody credits. We reject this suggestion, as the credits could be just as easily calculated if a split sentence had been imposed; what is more, the People’s proffered alternative would have left defendant with no remedy if the other case took more than 120 days to resolve (because section 1170, subdivision (d)’s recall power expires at that time).

So, defendant’s entitlement to relief in this case comes down to whether there is a “reasonable probability” that, had defense counsel objected or otherwise urged a split sentence, that “the outcome of the proceeding would have been different.” In other words, is there a reasonable probability the trial court would have imposed a split sentence?

We conclude that the answer is “no.” In deciding whether the presumption favoring a split sentence is rebutted, a trial court must ask whether “the interests of justice” render such a sentence “not appropriate.” (§ 1170, subd. (h)(5)(A).) Factors relevant to that determination include: (1) “the balance of custody exposure available after imposition of custody credits”; (2) “[t]he defendant’s present status on probation, mandatory supervision, postrelease community supervision, or parole”; (3) “[s]pecific factors related to the defendant that indicate a lack of need for treatment or supervision upon release from custody”; and (4) “[w]hether the nature, seriousness, or circumstances of the case or the defendant’s past performance on supervision substantially

outweigh the benefits of supervision in promoting public safety and the defendant's successful reentry into the community upon release from custody." (Cal. Rules of Court, rule 4.415(b).)

Applying these factors, it is not "reasonab[y] probabl[e]" that the trial court would have imposed a split sentence. At the time of sentencing, defendant had 772 days of custody credit (comprised of 386 days of actual credit). This would have left less than three years of custody time on the five-year sentence that was imposed. What is more, defendant was on probation at the time of the crimes charged in this case, and had eight prior convictions—all felonies at the time of imposition—in the 15 years prior to the charged crimes. Defendant's inability to obey the law, even while under supervision, demonstrates both (1) the futility of court supervision, and thus "indicate[s] a lack of need for . . . [such] supervision"; and (2) evidence that his unsuccessful "past performance on supervision" "substantially outweigh[s] the benefits" of a split sentence in this case. (Cal. Rules of Court, rule 4.415(b).) Defendant's chief response is that "it cannot be said that the trial court would not have split the sentence." This response is of no moment because, as explained above, it can be said that it is reasonably probable that the trial court could have split the sentence.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ